HARVARD

LAW REVIEW.

VOL. X. DECEMBER 26, 1896. NO. 5.

IS MERE GAIN TO A PROMISOR A GOOD CONSIDERATION FOR HIS PROMISE?

A CONSIDERATION for a promise is generally defined to be "some gain to the promisor, *or* some loss to the promisee," using the words gain or loss in the broadest sense; or, as more fully stated by the Court of Exchequer Chamber in Currie *v.* Misa,[1] "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Many other judges, as well as many elementary writers, have defined the word in this alternative form.

The question arises, Is mere gain to the promisor without some corresponding loss to the promisee ever a sufficient consideration?

An eminent writer whose views upon any legal question are entitled to the highest respect, seems to think not. Having defined consideration to be "the thing given or done by the promisee in exchange for the promise," he subsequently adds: "It is clear from this definition of a consideration that it must move from the promisee. Indeed, it is of the very essence of consideration that it be received from the promisee. What is received from one person cannot possibly be a consideration for a promise to another person."

[1] L. R. 10 Ex. 162.

No doubt, in the vast majority of cases, the consideration is at the same time a benefit to the promisor, and also a loss or detriment to the promisee, and in that case the consideration is received from the promisee; but is loss to the promisee always absolutely essential?

What "thing is given or done" by a pecuniary legatee, that enables him to recover at law upon the express promise of the executor to pay the legacy, (where he has received sufficient assets therefor,) as held by Lord Mansfield and the other judges of the King's Bench in Atkyns *v.* Hill[1] and Hawkes *v.* Saunders,[2] and by the Supreme Court of Pennsylvania in Clark *v.* Herring?[3] The cases in Cowper seem to have been approved by the Supreme Judicial Court of Massachusetts in Swazey *v.* Little,[4] although a statute in that State made it unnecessary to rest the decision on the common law rule. They are not overruled, as sometimes thought, by Deeks *v.* Strutt,[5] since the only question there was whether a promise to pay a legacy would be *implied* against the executor merely from the receipt of sufficient assets and a part payment of the legacy; not whether an express promise would be valid. See Doe *v.* Guy.[6]

Why can a creditor of a deceased person recover on the written special promise or note of an executor or administrator to pay the debt of the deceased if he has received sufficient assets from the estate so to do, as so frequently held in the authorities?[7] Is there any loss to the promisee in such cases?

In Reech *v.* Kannegal,[8] it was held that "at law if an executor promises to pay a debt due from the testator, a consideration must be alleged, as, *of assets come to his hands*, or of forbearance, or if admission of assets is implied by the promise." No doubt, forbearance by a creditor to sue, or to take out administration, if he had a right so to do, would be one good consideration for the note of the executor, devisee, or widow, as in Templeton *v.* Bascom[9] and Carpenter *v.* Page.[10] But is that the only consideration

---

[1] Cowper, 283 (1775).
[2] Ib. 289.
[3] 5 Binney, 33 (1812).
[4] 7 Pick. 299 (1828).
[5] 5 T. R. 690.
[6] 3 East, 120.
[7] 2 Wms. Ex. 1673; Sch. on Ex., § 255; Daniel on Neg. Ins., § 263; Trewinian *v.* Howell, Cro. Eliz. 91 (1588); Faxon *v.* Dyson, 1 Cranch C. C. 441 (1807); Sleighter *v.* Harrington, 2 Murphy (N. C.), 332 (1818); Childs *v.* Monies, Brod. & Bing. 460 (1821); 5 Moore, 282; Bank of Troy *v.* Topping, 13 Wend. 557 (1835); Thompson *v.* Maugh, 3 Iowa, 342 (1852).
[8] 1 Ves. Sr. 126.
[9] 33 Vt. 132.
[10] 144 Mass. 315.

that will suffice? It is true that in Rann *v.* Hughes[1] the executor was not held liable on his special promise; but neither forbearance nor receipt of assets was even *alleged* in that case; so that no consideration of any kind was claimed to exist.

Again, if a devisee of land, which is charged by the testator with the payment of a pecuniary legacy, expressly promises to pay the same, the promise may be enforced at law by the legatee. Beeker *v.* Beeker;[2] Van Orden *v.* Van Orden;[3] Kelsey *v.* Keyo;[4] Tole *v.* Hardy.[5] But surely the legatee gives nothing for such promise; and without it he could not recover at law; so that the express promise is the only ground of liability. Pelletrace *v.* Rathbone.[6]

If a depositor in a bank gives his creditor his check thereon, in payment of his claim, and the bank expressly promises such holder to pay the check to him, he can maintain an action against the bank for a subsequent refusal to do so. Why? What consideration does such promisee furnish the bank in exchange for the promise? What loss is sustained, what right parted with, what obligation assumed, what change of status suffered by the promisee? If A assigns to C a claim against B, and B expressly promises C to pay the same to him, C can recover upon that promise in his own name. Why? What consideration does C give B for the new promise? That such new promise must have a new consideration to support it is clear. Is not the consideration found in the fact that the promisor is, after such promise, no longer liable to a suit by the assignor and original creditor, and so some gain or advantage results or is supposed to result to him, but without any loss to the promisee? Burroughs *v.* Glover.[7] And see Liverside *v.* Broadbent.[8]

What consideration does a *gratuitous* indorsee and holder of a negotiable note advance, that enables him to enforce payment against the maker, where the latter has received a valuable consideration from the payee? Is not the sole consideration the benefit received by the promisor without any loss sustained by the promisee? Is not the acceptor of a draft liable to the drawee, if at all, because he has received, or is conclusively supposed to have received, a valuable consideration from the *drawer;* and not

[1] 4 Brown P. C. 27; 7 T. R. 350, note (1778).
[2] 7 Johns. 99 (1810).
[3] 10 Johns. 30 (1813).
[4] 3 Cow. 133 (1824).
[5] 6 Cow. 333 (1826).
[6] 18 Johns. 428 (1821).
[7] 106 Mass. 325.
[8] 4 H. & N. 610.

because of any detriment, loss, or disadvantage to the promisee or payee of the draft? No doubt a bill or note, if negotiable, or containing the words "value received," *prima facie* imports a consideration of some kind, but that does not indicate at all whether such consideration was loss to the promisee or gain to the promisor.

If a note reads "For value received of A. B., I promise to pay C. D., or order, one hundred dollars on demand, with interest," cannot C. D. recover on that note, although he gave no consideration for it, and sustained no loss or detriment?

If the holder of a promissory note says to the maker, "I feel uneasy about this note, I wish you would get A. B. to guarantee it"; and thereupon the maker, for a consideration wholly advanced by himself, procures A. B. to write his guaranty upon the back of the note, with the knowledge and assent of all parties, cannot the holder recover upon that guaranty although he has given nothing for such guaranty? Of course he could if he agrees to forbear suing upon the note, since he then furnishes part of the consideration in the suspension of his right; but suppose this transaction takes place before the note is due, and when there is no right of action to suspend, what then? Is the guaranty nugatory?

Of course, also, upon the strict principles held in some courts, there should be in such case a *privity* between the holder of the note and the guarantor; for some courts hold that if the latter, merely by an arrangement with the maker, unknown to the holder, and without his request, signs a guaranty for the note, the holder could not, upon afterwards hearing of the guaranty, enforce it; since privity of both parties in both the promise and the consideration is necessary to sustain the action. Ellis *v.* Clark;[1] Pratt *v.* Heddon.[2] But the question still remains, if the holder of the note was present when the guaranty was made, and assented to it, and so became privy to the *promise*, is it absolutely necessary that he should also part with something, in order to enable him to recover upon such promise of guaranty, if the guarantor has in fact received some valuable consideration from the maker of the note?

This principle does not apply merely to negotiable paper. In Doty *v.* Wilson,[3] the defendant, having been arrested by a sheriff on execution, was allowed to go at large, for which act the sheriff

[1] 110 Mass. 389. [2] 121 Mass. 116. [3] 14 Johns. 378 (1871).

was compelled to pay the amount of the debt to the execution creditor. Subsequently the defendant promised the sheriff to repay him the amount so paid, and the sheriff recovered on such promise. What consideration did he give in exchange for it?

If A pays to B a debt he owes him, and afterwards B recovers judgment against A for the same claim, because A neglected to plead payment and produce his receipt, A cannot, without a new promise by B to refund, recover back the sum paid; but with a new promise he can. Bentley *v.* Morse.[1] But what consideration does A furnish for this new promise?

In Ridout *v.* Bristow,[2] a widow of a debtor, being also his administratrix, gave the creditor her note for the amount of the debt, expressed to be for "value received by my late husband." The creditor recovered on the note without any proof of any loss, surrender of any right, or waiver of any claim by him, although want of consideration was set up in defence.

What supports a promise by A to pay B for doing exactly what B was already bound to do by a prior contract with C? What new consideration, loss, or detriment to B exists in such cases? Is not the promise binding on A solely from the supposed gain, advantage, or satisfaction ensuing to him from performance of the promise, and without any increased damage, loss, or cost to B than had already been paid for by C?

For instance, if A contracts with B to erect a house, and complete it ready for occupation by a certain day, and C intends to occupy it as a tenant on that day, but, learning that it may not be ready, offers to pay A an additional one hundred dollars if he will surely finish it at the stipulated time, which is done, and C moves in on the very day, is he not liable to A for the promised compensation? Still more obviously, if A had refused to complete the house for B, and was finally induced to do so only by the additional promise of C.

Shadwell *v.* Shadwell,[3] in the Common Pleas, is the earliest case on this point, in which the uncle of the plaintiff promised to pay him one hundred and fifty pounds sterling a year upon his intended marriage with a certain lady to whom he was already engaged. Subsequently the marriage took place according to the original agreement, and the defendant paid the annuity for several

---

[1] 14 Johns. 468 (1817).
[2] 1 Tyrw. 84; 1 Cr. & J. 231 (1830).
[3] 9 C. B. N. S. 159 (1860).

years, and on default to continue payment the promise was held to be upon sufficient consideration.

Scotson *v.* Pegg,[1] in the Exchequer, followed soon after, in which, in consideration of the plaintiff's promise to deliver a cargo of coal to the defendant, he promised the plaintiffs to unload the same in a certain number of days, but did not do so for five days beyond the time, whereby the plaintiffs were put to expense in keeping and maintaining the ship, master, and crew for the extra time. The defence was that the defendant's promise was without consideration, because the plaintiffs had previously bound themselves to other persons to deliver the coal to them, *or their order*, and that said persons, having sold the cargo to the defendant, had ordered the plaintiffs to deliver the coal to the defendant, as they well knew. This fact was admitted on demurrer, but the plaintiffs' second promise was held to be a good consideration for the defendant's promise, although they were under prior contract with others to do the very same thing, and so the defendant's promise was held binding, and the plaintiffs had judgment. Wilde, B. said: "If a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding. I accede to the proposition that, if a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing." Martin, B. added, "The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiffs had previously contracted with third parties to deliver to their order."

This subject was fully examined in a late case in Massachusetts, Abbott *v.* Doane,[2] in which the two preceding English cases were followed. The facts were that the plaintiff had signed an accommodation note to a corporation, which the latter had procured to be discounted at a bank for such corporation's own benefit. The note not being paid at maturity, the defendant, who was a stockholder, director, and creditor of said corporation, wished, *for some advantage to himself*, to have the note paid at once; and accordingly

[1] 6 H. & N. 295 (1861).

[2] 163 Mass. 433 (1895).

gave the plaintiff another note for the same amount, in consideration that the plaintiff would pay his note to the bank, which the plaintiff did. In a suit upon this second note, the defendant contended that his note was without consideration because the plaintiff was already bound in law to pay his own note to the bank, although it was an accommodation note given for another. But the defence was not sustained; Mr. Justice Allen saying, after citing many cases bearing on the subject, "It seems to us better to hold as a general rule, that if A has refused or hesitated to perform an agreement with B, and is requested to do so by C, who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A thereupon undertakes to do it, the performance by A of his agreement in consequence of such request and promise by C is a good consideration to support C's promise."

This is very carefully stated, and due prominence is given to the important facts that A has refused to perform his agreement with B, that C is pecuniarily interested in such performance, and that A is finally induced to perform it by the promise of C.

Brownell *v.* Lowe,[1] sometimes cited as *contra*, tends on the other hand, so far as it goes, to sustain the same view. There the plaintiff had contracted with a railroad company to build a section of the road, the work not to commence until the company had provided the means of making payments according to the terms of the contract. The company not having provided sufficient means of payment, the plaintiffs refused to proceed with the work. Thereupon, the defendants, being interested in the performance of the work, promised the plaintiffs to pay them the money, and the work was completed. The defendants were held bound by the promise, notwithstanding this defence was set up.

In some other cases, cited in opposition to this view, in 8 HARVARD LAW REVIEW, 27, there was no apparent benefit to the promisor, nor any loss to the promisee; that is, no loss which he was not already under obligation to undergo. Of course, therefore, no such promise could be held valid.

Thus, in Davenport *v.* First Congregational Society,[2] which was a promise by the plaintiff to relinquish his claim against a religious society, if they would promptly pay a former pastor what was due him, which they did. In such case there was neither loss to the promisee (the society) nor gain to the promisor.

---

[1] 117 Ind. 420 (1888).

[2] 33 Wis. 387.

The same may be said of Johnson *v.* Sellers.[1] The plaintiff had contracted with the trustees of an educational institution to take charge of the same with his wife as co-principal. Some question having arisen as to the plaintiff's obligation to bring his wife with him, the defendant, a trustee of the institution, promised to give him twenty-five hundred dollars if he would do so, which he did, and they taught a prosperous school. There was no evidence that the performance was of any benefit or advantage to the defendant. The court, while admitting the doctrine that one of two parties to a contract may waive performance by the other, and agree to pay more for its fulfilment than the original contract called for, held that a promise by a *third party* to induce its performance, or rather to prevent its breach, was not supported by a valid consideration.

The many cases of promises by the *original promisor* to pay an additional amount to the *original promisee* for merely performing his *original promise*, do not furnish much light on either side of the question now under consideration.

Those cases which hold that such second promise is binding, of which Munroe *v.* Perkins[2] is a type, proceed upon the ground that the first contract was abandoned by the parties, and a new one mutually substituted therefor.

On the other hand, the many authorities that deny the validity of such second promise, do so on the ground of public policy, or to prevent extortion, etc. Such are the promises to pay sailors extra wages, and witnesses, or officers of the law, extra fees, for merely doing a legal duty. See Harris *v.* Watson;[3] Stilk *v.* Myrick;[4] Bartlett *v.* Wyman;[5] Collins *v.* Godefray;[6] Dodge *v.* Stiles;[7] Callaghan *v.* Hallett;[8] and many others.

Looking at the subject in a practical light, is there any real objection to allowing a person of full age and sound mind, and in every way *sui juris*, to promise to pay for anything of value to him, and which he receives and enjoys in consequence of the promise, merely because some other person has promised to pay for what benefit he also received or expected to receive from the same transaction? If gain to the promisor merely can ever be a good consideration, there does not seem to be any legal difficulty in the way; if not, there is.

Edmund H. Bennett.

BOSTON, December 1, 1896.

---

[1] 33 Ala. 265 (1858).
[2] 9 Pick. 298.
[3] 1 Peake, 102 (1791).
[4] 6 Esp. 129; 2 Camp. 317 (1809).
[5] 14 Johns. 260 (1817).
[6] 1 B. & Ad. 950 (1830).
[7] 26 Conn. 463 (1857).
[8] 1 Caines, 106 (1803).